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Supreme Court, U.S.
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No. .....

In the Supreme Court of the United States

October Term, 1979

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Petitioner,

vs.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Illinois Central Gulf Railroad Company ("ICG"), respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 4, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 615 F.2d 470. The opinion of the District Court for the Eastern District of Missouri is reported at 468 F. Supp. 615.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on February 4, 1980. A timely Petition for Rehearing En Banc was denied on the 5th day of March, 1980, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

In a suit under Title 49, United States Code, Section 20(11), the Carmack Amendment, how does the shipper discharge its burden of proving that the cargo was delivered to the carrier in good condition when the carrier does not participate in the loading and has no opportunity to inspect the cargo before issuing its bill of lading, and when there is evidence of possible causes of damage existing before the cargo was delivered to the carrier?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 49:

§ 20(11). Any common carrier . . . subject to the provisions of this chapter receiving property for transportation from a point in one State . . . to a point in another State . . . shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States . . .

* * *

Any common carrier, . . . delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, . . . to which such property may be delivered or over whose line or lines such property may pass within the United States . . .

(Revised and Codified, October 17, 1978, as 49 U.S.C. § 11707.)

STATEMENT OF THE CASE

This case concerns the fate of a shipment of bauxite ore, a highly contaminable commodity, transported by ship from the mine in Guyana, South America, to the bulk commodities port in Mobile, Alabama.[1] The importer for Kaiser was Philipp Brothers which was designated as shipper on the bill of lading. From Mobile the ore was transported over petitioner's railroad in hopper cars to Kaiser's plant in Mexico, Missouri, where Kaiser rejected twelve railcars of ore on account of alleged contamination. Although many individuals handled or observed the ore at various times, there was no testimony to establish the source of contamination or exactly how many cars actually contained a contaminant.

Kaiser attempted to establish circumstantially that the ore in question became contaminated while in the custody of the ICG as a result of the railroad's failure to remove all residue of the preceding load from each railcar used to transport the ore. There was no direct evidence as to the condition of the ore at the time it was delivered to the railroad, but Kaiser did adduce the following evidence on that issue: (1) bills of lading reciting receipt of the ore in "apparent good order"; (2) deposition testimony of the shipper's agent, Stanley Malabud, who observed the ship being unloaded; (3) deposition testimony of dock employees about precautions they took to prevent contamination of bauxite ore.[2]

To refute Kaiser's claim of delivery in good condition, the ICG went forward with evidence of other possible

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1. The shipment was made in interstate commerce and original federal jurisdiction of the suit is pursuant to 28 U.S.C. 1337.

2. Kaiser also offered a Certificate of Analysis of a sample of bauxite ore prepared in Guyana, South America. The district court admitted it into evidence as a business record but accorded it no probative value on the delivery issue. The Court of Appeals concluded this finding was not clearly erroneous.

sources of contamination, focusing particularly on the unprecedented handling of the ore in question; i.e., after unloading from the ship but before delivery to petitioner it was stored at Mobile outdoors on a concrete pad for almost two weeks within 200 feet of iron ore, the principal contaminant.[3] In addition, evidence was presented that the preceding loads of all but two of the rejected cars was not iron ore; in fact, two of the rejected cars had carried calcined refractory grade bauxite ore on the immediately preceding load.

In addition, the evidence established a unique division of responsibilities at the Port of Mobile between shippers, dock employees and the railroad, which bears on the ICG's lack of opportunity to inspect cargo before issuing its bill of lading. The entire dock and storage area, together with all equipment used in unloading, storing and reloading the bauxite, are wholly owned, controlled and operated by the Alabama State Dock, a public agency of the State of Alabama. Dock employees perform all the procedures incident to handling, storing and loading the commodities. ICG is not permitted by the State Dock to control or participate in this operation.

The ICG delivers empty cars to dock employees at a location one mile from where the ore is loaded. Railroad representatives do not accompany the cars to the loading site; they are not present and do not participate in any

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3. A total of twelve cars were rejected by Kaiser as contaminated. One of these was a closed top hopper car rejected for tripoli contamination. This car had been loaded directly from the ship without intervening ground storage, and it had been personally inspected by the shipper's agent, Stanley Malabud, who apparently found it clean and suitable for transporting bauxite ore. The remaining eleven cars were open hoppers containing the ore that had been ground stored. Only eight of these actually were unloaded at destination, and iron ore contamination was observed in at least some of these. Three were not unloaded at all, but they were rejected as contaminated even though three Kaiser employees made a topside inspection and observed no evidence of contamination.

way in the actual loading operation. Dock employees load and weigh the cars and return them to the railroad at the same location. It is not until the loaded cars have been returned to the ICG that the bill of lading is prepared and issued.

On March 20, 1979, after a two-day trial, the district court entered judgment in favor of Kaiser for only the salvage proceeds of the ore. The basis of the trial court's holding was:

> Although the matter is not free from doubt, we hold that trier of fact could find that plaintiff made a prima facie case [of delivery in good condition] . . . . In our judgment, however, the overwhelming weight of the evidence negatives the verity of this weak prima facie showing. *We find that plaintiff has not established by the preponderance of the evidence that the bauxite ore in question was in an uncontaminated condition when delivered to defendant.* 468 F. Supp. 615, 618 (E.D. Mo. 1979). (Emphasis added.)

Kaiser appealed, but the ICG did not, consistent with its position that Kaiser was entitled to the salvage proceeds of the ore in full satisfaction of its claim.

On March 5, 1980, the United States Court of Appeals for the Eighth Circuit, rejecting the district court's factual findings, held that Kaiser had established all elements of a *prima facie* case, including delivery in good condition, and that the ICG was liable under the Carmack Amendment. The Court reversed the judgment of the district court and remanded the cause solely for a determination of damages.[4]

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4. Because of its ruling on the delivery issue, the district court never reached the ICG's ultimate defense: even if Kaiser had established a *prima facie* case, the railroad was relieved of

(Continued on following page)

REASONS FOR GRANTING WRIT

1. The Decision Below Raises Important Questions of Federal Law Which This Court Did Not Resolve in Its Last Decision in This Area and Which Present a Logical Sequel to That Decision.

This Court last addressed the subject of shipper claims against carriers for damage to goods in transit in its landmark decision in *Missouri Pacific Railroad Company v. Elmore & Stahl*, 377 U.S. 134 (1964). There this Court held that a shipper establishes a *prima facie* case of liability if it proves: (1) the cargo was delivered to the carrier in good condition; (2) the cargo reached its destination in damaged condition; and (3) the extent of damages actually sustained. If all three elements are established, then the burden of proof shifts to the carrier to demonstrate its freedom from negligence and that the damage resulted from one of the causes for which a carrier is not responsible. But *Elmore* left unanswered many questions concerning the element of delivery in good condition, which had been conceded in that case. Here the issue of delivery in good condition was sharply contested below, and a substantial part of the evidence adduced at trial bore on the question of whether Kaiser had proved that the ore was in good condition when it was delivered to the ICG.

Footnote continued—
liability because of its reliance on the shipper's custom and practice of substituting its judgment for that of the railroad in selecting cars suitable for transporting bauxite ore. The Eighth Circuit apparently has resolved that issue on the merits against the railroad as an original matter, for the only subject remanded to the district court is a determination of damages. Moreover, the Court virtually mandated that the district court compute damages on the basis of twelve carloads of ore, thereby rejecting express findings that at most only four cars contained contamination, and three cars were found by three Kaiser employees to have no evidence of contamination.

Petitioner contended, and the trial court found, that Kaiser had failed to prove delivery in good condition. Although Kaiser had presented circumstantial evidence of delivery in good condition, the ICG adduced evidence pointing to other possible sources of contamination from which it could be inferred that the contamination occurred *before* the ore was delivered to the railroad for transportation. It was the ICG's position, and the trial court found, that Kaiser failed to prove delivery in good condition, an element essential to a *prima facie* case of liability. Contrary to the opinion of the Eighth Circuit, therefore, the burden of proof never shifted to the ICG to demonstrate its freedom from negligence and that the damage resulted from a cause for which the railroad was not liable.

In reversing the district court, the Court of Appeals relied principally upon the recital in the bills of lading that the ore was received "in apparent good order, except as noted (contents and condition of contents of packages unknown)." The ICG did not note any other exceptions on the bills of lading. The only other evidence of delivery in good condition was deposition testimony of the shipper's agent and dock employees concerning the precautions they took against contamination while the ore was being unloaded from the ship and placed in ground storage.

There was no evidence bearing on the condition of the ore during the intervening two weeks when it was stored outside on a concrete pad within 200 feet of iron ore, the principal contaminant. There was no direct evidence concerning the condition of the ore at the time it was actually loaded in the railcars and delivered to the carrier. Although the ICG did not participate in the loading of the ore and had no opportunity to inspect it in the loaded hopper cars prior to issuing the bills of lading, the Court

of Appeals held that ICG was "negligent" in issuing the bills of lading with no exceptions noted.

The questions to be resolved herein are present in all shipper-carrier suits where delivery in good condition is not conceded, and they comprise a logical and necessary sequel to this Court's decision in *Elmore*. There, this Court held that the shipper must prove delivery of the cargo in good condition but did not address *how* the shipper discharges that burden:

1. Must the shipper exclude pre-delivery cases of damage?

2. Must the shipper adduce direct evidence of the condition of the cargo at the time it is delivered to the carrier?

3. Is the statutorily prescribed recital in the bill of lading of receipt in apparent good order sufficient when supported only by remote, circumstantial evidence of the condition of the cargo several days before it was delivered to the carrier?

As a common carrier, petitioner has a statutory duty to provide transportation to shippers. 49 U.S.C. § 1(4); cf. *Brotherhood of Ry. & S.S. Clerks, etc. v. Florida East Coast Ry. Co.*, 384 U.S. 238 (1966). It may decline to receive cargo for shipment only "in the exigencies of safeguarding life and property. . .". *United States v. Pryba*, 502 F. 2d 391, 399 (D.C. Cir. 1974). The carrier must transport the cargo whether it can inspect the goods for condition or not. Once a carrier has accepted the cargo for transportation, the law imposes a substantial liability with narrowly prescribed exceptions based on the premise that the carrier has peculiarly within its knowledge the facts and circumstances that may relieve it of liability. The shipper's burden of proof on the element of delivery in good con-

dition should be no less onerous, for to paraphrase *Elmore & Stahl*: before delivery to the carrier, it is the *shipper*, not the carrier, which has "peculiarly within its knowledge all the facts and circumstances on which it may rely" to establish the condition of the cargo.

In this case, the contamination had to occur in one of two ways: either the contaminant was in the ore before it was delivered to the ICG, or residue from preceding loads in the hopper cars contaminated the ore. Because of the weight the Eighth Circuit accorded the bills of lading, the Court effectively imposed upon the carrier, not the shipper, the burden of proving which occurred. This holding not only conflicts with those of this Court and several Courts of Appeals, but it also contravenes the plain meaning of 49 U.S.C. § 101, which provides in relevant part:

> When . . . bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement . . . that the goods are said to be goods of a certain kind or quantity, or in a certain condition . . . such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not . . . of the kind or quantity or in the condition they were said to be by the consignor.

That the bills of lading recite that goods described as "RASC calcined bauxite ore" were received in "apparent good order" does not render the ICG liable when, as here, the *shipper* loaded the ore. The patent intent of 49 U.S.C. § 101 is to protect carriers from the binding effect of the shipper's description of cargo which the carrier could not inspect before accepting it for carriage.

To hold otherwise is to compel carriers to conduct costly and time consuming inspections of all cargo loaded by shippers; it could necessitate unloading, inspecting and reloading cargo, all before issuing the bill of lading. More-

over, carriers would be compelled to provide inspectors with a wide range of technical expertise to accommodate the infinite variety of products shipped in interstate commerce. Because shippers load most goods transported by common carriers, as a matter of policy it is shippers, who already possess the requisite expertise and who load their own products, who should be required to account for the condition of cargo until it is delivered to the carrier for transportation.

The issues to be decided in this case will have a substantial 'economic impact on interstate shippers and carriers alike. In 1964 when *Elmore* was decided, rail carriers paid slightly more than $145,500,000 to shippers for freight claims. In 1978 (the most recent data available), rail carriers paid shippers in excess of $300,000,000 for those claims, an increase of 109 percent. Claim payments on bulk cargo alone, such as bauxite ore, exceeded $22,000,000 in 1978. During the same period of time ton mile revenue increased by only 30 percent, and the railroads' collective rate of return on investment shrunk from 3.16 to 1.62 percent.

The impact of these issues on the ICG also is substantial. In 1964 the ICG had net revenue from freight hauling of just over $18,000,000 and paid freight claims of $5.1 million. By comparison, in 1978 the ICG's net revenue from freight hauling was $2.5 million, and it paid freight claims of $9.7 million. Thus, its net revenues are down 86 percent, and freight claims paid are up 90 percent.[5]

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5. Economic data for the railroad industry was obtained from annual reports of the Freight Claim Damage Prevention Division of the American Association of Railroads and from the 1979 Yearbook of Railroad Facts published by the American Association of Railroads. ICG economic data was obtained from ICG annual reports.

For the reasons discussed above, this case provides an opportunity for this Court to resolve important questions concerning how a shipper sustains its burden of proof on an essential element of its cause of action against a carrier for damage to cargo transported in interstate commerce. A definitive ruling on the questions presented will aid shippers, carriers and the judiciary alike.

2. The Decision Below Conflicts With an Early Decision of This Court and Those of Several Courts of Appeals As to How a Shipper Discharges Its Burden of Proof on the Issue of Delivery in Good Condition.

In contrast with the decision of the Eighth Circuit below, this Court and the Courts of Appeals for the Second, Third, Sixth, Seventh and District of Columbia Circuits would have required *direct* evidence of the condition of the ore at the time it was delivered to the railroad under the circumstances of this case. Kaiser adduced no direct evidence as to the condition of the ore at the time it was delivered to the railroad for carriage. Of the circumstantial evidence adduced by Kaiser on the issue of delivery in good condition,[6] only the bills of lading are closely related in time to delivery of the ore to the railroad. The observations of Stanley Malabud and the dock employees end with the placement of the ore outdoors on a concrete pad within 200 feet of iron ore, the principal contaminant. Although the ore remained there for almost two weeks before it was loaded by dock employees into railcars and delivered to the railroad for transportation, the next witnesses to observe the condition of the ore were Kaiser employees at destination.

In rejecting the district court's finding that Kaiser failed to prove delivery in good condition, the Eighth Cir-

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6. That evidence was: (1) bills of lading reciting receipt in apparent good order; (2) deposition of Stanley Malabud who observed the ship being unloaded; and (3) depositions of dock employees about their precautions to prevent contamination of bauxite ore.

cuit relied principally on the bills of lading, which recited receipt of the ore in apparent good order. Despite the ICG's inability to inspect the cargo occasioned by the loading procedures described at pages 4-5, *supra*, the Court expressly rejected the ICG's contention that the bills of lading were insufficient to establish delivery in good condition.

Without specifying how, the Court of Appeals stated that the ICG had "ample opportunity to inspect the goods" or "to note that it was unable to ascertain their condition." 615 F.2d at 475-476. In fact, the bills of lading *do* note that the ICG was unable to ascertain the condition of the ore. As prescribed by statute, 49 U.S.C. § 101, the bills of lading recite: "Received . . . in apparent good order, except as noted (contents and condition of contents of packages unknown). . . ." As applied to a bulk commodity loaded by the shipper, this recital can only mean that the surface appears to be in good order, but the condition of the rest, which is not visible and open to inspection, is unknown. A careful inspection of the eleven open hopper cars would have revealed only the top layer of a commodity that looks like gravel. Even the Court of Appeals found that without technical training or experience, it would be "difficult to detect" the presence of iron ore mixed in bauxite ore.[7] 615 F.2d at 475, n. 6. Indeed, three Kaiser employees who deal with bauxite ore on a daily basis observed no evidence of contamination when they conducted topside inspections of three open hoppers at destination.[8]

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7. The twelfth rejected car contained a white contaminant which the Court of Appeals opined would be easy to detect. That car was loaded from the ship directly into a *closed* top hopper car which had been personally inspected and approved by Stanley Malabud, the shipper's agent.

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8. Although there is accordingly no evidence of damage to the ore in these cars, the Court of Appeals has directed the district court to include them in the damage computation because

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Implicit in the Court of Appeals' discussion of the bill of lading is the conclusion that the recital therein, supported only by remote, circumstantial evidence, is conclusive and binding upon the carrier even when: (1) there is evidence of other possible causes of damage preceding delivery to the carrier which could not have been detected by the carrier at the time of delivery; and (2) there is no direct evidence of the condition of the cargo at the time it is delivered to the carrier. In these respects the Eighth Circuit's holding conflicts with an early decision of this Court and those of several Courts of Appeals.

In *Clark v. Barnwell,* 12 How. 272, 53 U.S. 272 (1851), this Court considered the effect of a similar recital. There, like here, the bill of lading recited that the goods were shipped in good order and stated in addition, "contents unknown". This Court found it obvious that the recital pertained only to the external condition of the cargo and then stated:

> . . . if the evidence on the part of the defense [the carrier] laid a foundation for a reasonable inference, that the damage resulted from an imperfection in the goods when packed in the cases, *or had occurred previously to their being shipped on board,* the burden was thrown upon the libelants [shippers] to rebut the inference. *Id.* at pp. 283-284. (Emphasis added.)

In contrast with the holding of the Eighth Circuit below, the following decisions of the Second, Third, Sixth, Seventh and District of Columbia Circuits stand for the

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Footnote continued—
the ICG consented to their not being unloaded. The record establishes that the ICG did so only because Kaiser had already rejected the cars for contamination and that the ICG would *not* have done so if it had *known* that there was no evidence of contamination. 615 F.2d at 479.

proposition that remote, circumstantial evidence of condition and the recital in a bill of lading of receipt in good order are not sufficient to establish delivery in good condition when: (1) there is evidence of other possible causes of damage existing prior to delivery to the carrier; (2) there is no adequate means or opportunity for the carrier to inspect the cargo; or (3) the cargo is delivered under seal. In such circumstances these courts hold the shipper must *exclude* other possible causes of damage; it is not the carrier's burden to *prove* that the cargo was damaged prior to delivery.

In *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 313 F. 2d 864 (7th Cir. 1963), and *Armour Research Foundation of Illinois Institute of Technology v. Chicago, Rock Island & Pacific Railroad Co.*, 311 F. 2d 493 (7th Cir. 1963), the Seventh Circuit held that the recital in a bill of lading of receipt in apparent good order was insufficient to prove delivery in good condition. *Harris, supra,* concerned a shipment by trailer of frozen sausage which was rejected at destination because the odor indicated spoilage. To prove delivery in good condition the shipper had presented not only the bill of lading, but also testimony concerning the following: (1) the manufacturing procedures for the sausage; (2) freezing procedures which were performed immediately after manufacture; (3) the solid frozen state and temperature of the sausage when delivered to the carrier; and (4) the condition of the sausage at destination, which was attributable to thawing and refreezing.

Despite this evidence, the court reversed the district court's judgment in favor of the shipper, holding that the shipper did not prove delivery in good condition because it had not demonstrated that the condition which prompted rejection of the sausage was *not* present when

the cargo was delivered to the carrier. Thus, it was the shipper's burden to *exclude* possible causes of damage that might have occurred before the cargo was delivered to the carrier. (The opinion nowhere stated that the shipment in question was under seal.)

Similarly, in *Armour, supra,* the Court held that the shipper's handling of the cargo before delivery to the carrier precluded a finding that the goods were undamaged when delivered to the carrier. To hold otherwise would be to subject the carrier to liability based merely on speculation and conjecture.

In *Blue Bird Food Products Co. v. Baltimore & Ohio R. Co.,* 492 F. 2d 1329 (3rd Cir. 1974), the Third Circuit found the bill of lading insufficient to establish delivery in good condition and required the shipper to adduce *direct* evidence of the condition of the cargo at the time it was delivered to the carrier. There, as here, the shipper argued that the carrier had an opportunity to inspect the cargo during the loading process or after the cargo was loaded but before seals were attached. Because a carrier does not assume responsibility for the goods until after they had been loaded, sealed and released by the shipper, the Court rejected this argument stating that the carrier is under no obligation to inspect the cargo prior to taking possession.

In *Ed Miniat, Inc. v. Baltimore & Ohio Railroad Co.,* 587 F. 2d 1277 (D.C. Cir. 1978), the Court of Appeals for the District of Columbia expressly relied upon the Third Circuit's decision in *Blue Bird Food Products Company, supra,* to hold that a shipper of beef was not entitled to recover from the carrier because it failed to prove delivery in good condition. In that case, forequarters of beef moved by "piggyback" trailers under bills of lading reciting receipt in "apparent good order." The cargo was rejected at destination for spoilage.

The trailers had been loaded and sealed by the shipper at its plant. To show that the beef had been packed in good condition, the shipper presented its record of incoming meat at its plant on the day the shipment in question was processed and testimony that an inspector of the United States Department of Agriculture supervised plant operations that day. The Court of Appeals held that the bills of lading, together with the plant records and the presence of the U.S.D.A. inspector, were insufficient to prove delivery of the meat to the carrier in good condition. The Court concluded that carriers have a fundamental right to have the shipper establish the elements forming the basis of liability, and to hold otherwise would be "to subject carriers to liability on the basis of no more than a mere possibility that they were responsible for damages to shipments." *Id.* at p. 1281.

In *Hoover Motor Express Co. v. United States*, 262 F. 2d 832 (6th Cir. 1959), the Sixth Circuit held that a bill of lading was evidence of good condition only as to whatever goods were visible and open to inspection. The bill of lading there, as in the instant case, recited receipt in "apparent good order . . . (contents and condition unknown)", which the Court characterized as an express limitation on the carrier's acknowledgement.

In *Ohio Galvinizing & Manufacturing Company v. Southern Pacific Company*, 39 F. 2d 840 (6th Cir. 1930), a case involving metal ice cans, the Sixth Circuit also held that the recital in the bill of lading of receipt in apparent good order was not sufficient to prove delivery in good condition because the carrier could make only a superficial inspection of the cans when they were unloaded from a steamship and reloaded into rail cars.

In *The Niel Maersk*, 91 F. 2d 932 (2d Cir. 1937), *cert. denied*, 302 U.S. 753 (1937), the Second Circuit reversed a

judgment for the shipper, despite evidence showing carrier negligence, for the sole reason that the shipper had failed to prove delivery in good condition. The Court held the bill of lading insufficient to establish the condition of the goods at delivery and properly observed that absent proof of delivery in good condition, questions concerning the limited exceptions to liability were not in issue. Citing *Schnell v. The Vallescura,* 293 U.S. 296 (1934), the Court acknowledged that the carrier bears the loss it cannot explain or bring within recognized exceptions to liability. However, the condition of goods when delivered to the carrier is *not* within the carrier's knowledge, and the carrier "should not have the burden of separating damages arising from causes prior to shipment from damages due to negligent stowage." *Id.* at pp. 934-935.

The liability of carriers prescribed in 49 U.S.C. § 20(11) is substantial; frequently it is characterized as that of an "insurer", comparable to *"res ipsa loquitur,"* or "absolute liability". Congress intended that shippers not be required to prove negligence on the part of a carrier for reasons well stated by this Court:

> The general rule of carrier liability is based upon the sound premise that the carrier has peculiarly within its knowledge "[a]ll the facts and circumstances upon which [it] may rely to relieve [it] of [its] duty . . ." *Missouri Pacific Railroad v. Elmore & Stahl, supra,* 377 U.S. at 143.

Requiring a shipper to prove by direct evidence an element essential to its *prima facie* case of liability does not subvert Congressional policy. And by analogy to *Elmore,* the burden of loss should be on the *shipper* when it cannot establish by a preponderance of the evidence that the cargo was delivered in good condition. Before cargo is delivered to the carrier, only the shipper "has peculiarly within its

knowledge all the facts and circumstances upon which it may rely" to establish the condition of the cargo. Permitting a shipper to establish delivery in good condition with less than direct evidence under the facts presented here improperly extends carrier liability beyond the scope intended by Congress.

The foregoing demonstrates that the opinion of the Eighth Circuit below conflicts with an early decision of this Court and those of several Courts of Appeals. The Eighth Circuit has permitted the shipper to prove delivery in good condition by: (1) the recital in the bill of lading of receipt in apparent good order; and (2) circumstantial evidence of precautions taken against contamination at a time remote from the actual loading and delivery of the ore. This evidence was held sufficient even though the ICG had no opportunity to inspect and ascertain the condition of the ore, and the evidence showed other possible causes of damage prior to delivery of the carrier. When those circumstances were present, the Second, Third, Sixth, Seventh and District of Columbia Circuits required shippers to prove more on the issue of delivery in good condition: in addition to the bill of lading, shippers were required to adduce *direct* evidence of the condition of the cargo at the time it was delivered to the carrier, and thereby exclude other possible causes of damage. This conflict justifies granting a Writ of Certiorari.

Moreover, the correctness of the decision below is open to serious challenge. The record clearly demonstrates, and the trial court found, that Kaiser did not prove that the ore was in an uncontaminated condition when delivered to the ICG and that at most only four of the twelve rejected cars contained contamination. The Eighth Circuit rejected those factual findings and unjustifiably conducted a *de novo* review of disputed facts, substituted its own judgment for that of the trier of fact, and resolved *sua sponte* the merits

of an issue never reached by the district court. FRCP 52(a); *McCaughn v. Real Estate Company,* 297 U.S. 606 (1936); *Blackhawk Hotels Co. v. Boufaey,* 227 F. 2d 232, 235 (8th Cir. 1955).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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79-1910

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No. .....

In the Supreme Court of the United States

October Term, 1979

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Petitioner,

vs.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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KAISER ALUMINUM & CHEMICAL CORPORATION, Plaintiff,

v.

ILLINOIS CENTRAL GULF RAILROAD COMPANY, Defendant.

No. 77-976C(B).

United States District Court, E. D. Missouri, E. D.

March 22, 1979.

MEMORANDUM OPINION

REGAN, District Judge.

In this action brought under the Carmack Amendment (49 U.S.C. Section 20(11), the issue is whether, and if so to what extent, a shipment of calcined refractory bauxite became contaminated and worthless to plaintiff while in the custody and control of defendant, a common carrier by rail. It is plaintiff's contention that the railroad cars furnished by defendant to transport the bauxite had not been adequately cleaned of their previous cargos, with the result that the bauxite became contaminated.

Calcined bauxite is the principal material used in the manufacture of refractory brick. Plaintiff, which manufactures refractory brick at its plant in Mexico, Missouri, purchased the bauxite through Philipp Brothers from the Guyana Bauxite Company, Ltd. in Guyana, South America, for delivery FOB railcars at Mobile, Alabama.

The parties have stipulated that on May 16, 1975, the motor vessel Arrow Cane was loaded in Guyana with 16,000 metric tons of calcined bauxite. Of this load, 4,272.158 metric tons were consiged to plaintiff's Mexico,

Missouri, plant, the balance being consigned to other companies purchasing bauxite through Philipp Brothers. Prior to the vessel's arrival, Philipp Brothers notified defendant as to the time the ship would arrive, requesting that the railroad arrange to furnish clean, covered, hopper cars suitable for transporting the cargo of bauxite ore. Calcined bauxite is highly susceptible to contamination.

The Arrow Cane arrived at the Port of Mobile on May 23, 1975. By that time, defendant had assembled a number of cars and had them on hand, empty, ready for loading when the ship came in. It was the normal practice of defendant to inspect and clean its cars before furnishing them to its customers. There is no affirmative evidence as to whether it did so as to the cars assembled on this occasion. However, it had been the custom and practice of Philipp Brothers over a period of years to have one of its representatives (in this instance Stanley Malabud) personally inspect each car tendered by defendant for loading to determine its suitability for shipping bauxite, rejecting those he felt were unclean and not suitable. Of those tendered in this case, Malabud rejected five to ten cars as containing impurities or foreign matter, and these were accepted back by defendant. The remaining cars were approved by Malabud for loading.

The entire dock and storage area where the Arrow Cane docked and where the railroad cars were loaded, as well as all equipment and vehicles used in the loading and storage of ore, were wholly owned, controlled and operated by the Alabama State Docks, a public agency of the State of Alabama.[1] The railroad cars which were accepted by Philipp were, as was the practice, initially

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1. The tariff of the Alabama State Docks disclaims any liability for damage to cargo on its wharves, including damage caused by contamination.

brought to a designated joint interchange track, approximately a mile from the actual loading site.

No representative of the defendant is present or participates in the loading process. The practice is for Alabama State Docks personnel, under the supervision of the shipper or its agent, including Philipp Brothers, to load the cars from the ship, and weigh and count the cars. After they are loaded, the rail cars are then interchanged to the defendant by Alabama State Docks personnel at the joint interchange track. Not until this is done does the railroad receive the bill of lading from the shipper or its agent.

For whatever reason, the total number of cars initially assembled by defendant was not sufficient to load the entire cargo of the Arrow Cane,[2] so that although sixty-three cars were necessary to load plaintiff's portion of the cargo,[3] only fifty (covered hopper) cars consigned to plaintiff were loaded from the ship. After all available cars were loaded, the remainder of the ore was removed from the bottom of the ship's hold into dump trucks and deposited a short distance away on a concrete pad and covered, at the instance of Malabud, with a plastic sheet.

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2. The record shows that Philipp's letter ordering the cars referred to a different vessel with a May 15 arrival date. Of more importance, the letter stated that the ship was carrying 13,000 metric tons of bauxite. Although defendant was orally notified that the name of the ship had been changed, defendant's computations as to the number of cars required had already been made on the basis of the tonnage originally specified. It would appear that the 3,000 increase in tonnage could well have had a bearing on the shortage in the number of cars defendant had on hand at the time the Arrow Cane docked.

3. To put the matter in perspective: In addition to the 50 covered hopper cars loaded for plaintiff, defendant also initially furnished a number of other cars sufficient to transport the balance of approximately 11,500 tons of bauxite consigned to others than plaintiff. The decision as to which consignee would be required to wait until 13 additional cars became available was made by Malabud alone.

Malabud then departed Mobile to attend to other business without making any arrangements either for an inspection of the cars which defendant was to furnish later or to supervise the loading of the remainder of the bauxite for shipment to plaintiff.

Several days later, plaintiff was advised by defendant that the only cars then available were open top hoppers. Although covered hopper cars are the only ones customarily used for transporting bauxite, the use of the open top hoppers were acceptable to plaintiff. Thereafter, the remaining bauxite ore was loaded from the concrete pad by Alabama State Docks' personnel onto 13 open top hopper cars which, after the usual interchange, transported the bauxite to plaintiff's plant at Mexico, Missouri.

Of the 50 cars which had been loaded directly from the ship for plaintiff, only one was the subject of a contamination claim. When that car was unloaded, a white substance (later determined to be tripoli) was observed.[4] This car was one of those which Malabud had personally inspected and found by him to be clean and suitable for loading.

Of the second group of cars (those which transported the ground stored bauxite), eleven (eight of which were unloaded) were the subject of a contamination claim. A red rock substance, later determined to be iron ore, was observed by plaintiff's employees in the contents of some of the eight cars during the unloading process. As held infra, we do not credit the trial testimony of witness Charles Jackson that he observed red contaminants in all eight of the cars.[5]

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4. The normal color of bauxite is very dark, almost black.

5. In his deposition, Mr. Jackson testified that he observed the contaminant only in the first hopper of the first car which was unloaded and that he neither noticed nor paid attention to the other cars.

The other three open hopper cars were not unloaded, and although plaintiff's employees had observed no evidence of contamination in them upon a visual topside inspection, they were nevertheless claimed to be contaminated. Based solely on plaintiff's representation that the contents of these cars were also contaminated, defendant authorized plaintiff not to unload them in order to avoid the expense of reloading them as was done with the other eight cars. Defendant had no knowledge, and was not informed, that plaintiff had inspected the cars and had seen no evidence of contamination.

The contents of the cars rejected by plaintiff were thereafter sold by defendant to a salvage company for $17,887.87 on October 23, 1975. The proceeds of the sale are held by defendant but are admittedly owing to plaintiff unless, as contended by plaintiff, it is entitled to the full purchase price and expenses paid and incurred by it, together with interest.

The initial question is whether plaintiff made a prima facie case of liability under the Carmack Amendment. To recover thereunder, the evidence must sufficiently prove that at the time the bauxite ore was delivered to defendant, it was in good, that is, an uncontaminated, condition and that it was in damaged, that is, a contaminated condition when it was delivered to plaintiff. Once it has been established that the goods were in good condition when turned over to the carrier, the carrier can relieve itself of liability for damage to the goods only by showing not only that it was free from negligence but that the damage was caused by an act of God, the public enemy, the act of the shipper, public authority, or the inherent vice or nature of the goods. *Missouri Pacific Railroad Company v. Elmore & Stahl*, 1964, 377 U.S. 134, 84 S.Ct. 1142, 12 L.Ed.2d 194. However, the carrier has no such

burden absent a finding that the goods were in good condition when they came into its custody and control.

To prove that the bauxite ore was uncontaminated when loaded on the Arrow Cane, plaintiff offered a certificate of analysis made in Guyana with an accompanying affidavit (in lieu of testimony) of the superintendent of the laboratory of Guyana Bauxite Company, Ltd. on the basis of which the analysis was admitted into evidence as a business record of the company. Nevertheless, we do not believe that the certificate sufficiently demonstrates that the 16,000 metric tons of bauxite actually loaded on the Arrow Cane on May 16, 1975 were free of contamination.

True, if a representative sample of a load is analyzed, that should suffice, prima facie, to show the condition of the entire load. However, there is no evidence, either in the affidavit, the certificate of analysis or elsewhere, as to the date, time or place at which the sample of ore was obtained and the analysis was made, or with respect to the circumstances and procedures involved in obtaining a representative sample and making the analysis. Of significance also is the fact that although the purported purpose of the certificate was to obtain customs clearance for the bauxite, it was not made until June 4, 1975, some 12 days after the vessel docked at Mobile, Alabama, and after the cargo had already been unloaded and delivered to the ultimate consignees. And inasmuch as no analysis of the bauxite was made in Mobile, Alabama, prior to unloading the vessel, the evidence leaves in a state of uncertainty the actual condition of the ore at the time it was placed in and removed from the hold of the ship.

Plaintiff urges that the printed statement on defendant's bill of lading acknowledging receipt of the bauxite "in apparent good order" of itself establishes a prima facie

case of delivery of the bauxite to the defendant in an uncontaminated condition. Under the circumstances here present, we do not agree that this statement has the conclusive effect on the issue of contamination contended for by plaintiff. The cars were all fully loaded by personnel of Alabama State Docks with no participation by defendant's employees prior to the time the cars were delivered to defendant. They neither saw nor inspected what was placed in the cars. And, unquestionably, the railroad employees had no expertise in determining whether bauxite is contaminated. There is no evidence that such layman would know, absent an analysis of the material, whether it was contaminated, particularly since the shipper responsible for the loading had, in effect, vouched for the good condition of the material.

Although the matter is not free from doubt, we hold that the trier of the fact could find that plaintiff made a prima facie case on the basis of Malabud's testimony that he visually watched the unloading of the ship's cargo and observed no foreign materials in the bauxite, together with the testimony of the employees of the Alabama State Docks that the concrete pad and all equipment used in the unloading process had theretofore been thoroughly cleaned. In our judgment, however, the overwhelming weight of the evidence negatives the verity of this weak prima facie showing. We find that plaintiff has not established by the preponderance of the evidence that the bauxite ore in question was in an uncontaminated condition when delivered to defendant.

We first consider plaintiff's claim as it relates to the one closed hopper car containing the bauxite contaminated with tripoli. Plaintiff's evidence is to the effect that this easily seen white contaminant constituted 20 per cent of the load. Malabud had carefully inspected this (as well as

the other 49 cars) to be certain it was clean. It was his practice to reject any car containing even as much as one pound of a contaminant. He could not have failed to observe the tripoli had it been in the empty car.[6] Defendant had nothing to do with the loading process, so that it is evident that if the bauxite in this car was contaminated, that condition existed at the time the car came into the custody and control of defendant.

As for the eleven rejected open top hopper cars, we are also of the opinion that to the extent some of their loads may have been contaminated, defendant was not the responsible party. These eleven cars and two others had transported the bauxite which had been stored on the concrete pad. Not only was ground storing of bauxite unprecedented at the Port of Mobile, but the equipment used at the Docks in handling bauxite was also used in handling other materials, including iron ore. And iron ore, the red contaminant identified by plaintiff's witnesses, was in fact ground stored within 200 feet of the concrete pad. The Docks' personnel had no expertise (and expressed no opinion) concerning the condition of the bauxite.

Two of the thirteen cars were accepted by plaintiff. Only two of the remaining eleven cars had transported iron ore in their immediately preceding loads. In fact, two of the rejected cars had previously carried calcined bauxite ore. And although four cars had previously carried other materials, none of them could have been the red contaminant which plaintiff's employees allegedly observed during the process of unloading the cars at the plant. As we have held supra, we do not believe that Jackson testified truthfully that he saw red contaminant

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6. There is no evidence that the car had previously carried tripoli.

in all eight cars as they were being unloaded. The only other witnesses who testified that he observed any of the cars being unloaded was William Holtcamp. In his deposition, Holtcamp stated that he did not know how many cars he observed being unloaded other than that there were more than one. At the trial he recalled seeing three or four cars being unloaded, in each of which he saw a red foreign material.

The bauxite unloaded from all of the eight cars was all put in one pile separate from the other bauxite, so that it became impossible to determine whether the red contaminant was actually in all the cars. The remaining three cars were not unloaded. Yet, in spite of the fact that when visually inspected by plaintiff's employees no evidence of contamination had been noted, these cars were also rejected by plaintiff.

We have concluded that no more than three or four, at the most, of the eleven open top hopper cars rejected by plaintiff contained the red contaminant. Even so, we find from the weight of the evidence that whatever may have been the contamination in these or the other cars was existent prior to the time the bauxite was delivered to defendant. As we view the evidence, plaintiff must stand or fall on Malabud's testimony that he watched the ship's unloading process carefully enough to ascertain that all the bauxite being removed from the vessel was free of contaminants. We have noted supra that Malabud failed to note the presence of tripoli. It is equally likely that he failed to note the presence of other contaminants in the bauxite being removed from the bottom of the hold at the end of a very long day.[7]

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7. There is an indication in Malabud's testimony that he might have slept for a few hours during the unloading.

It follows from the foregoing that plaintiff is entitled to judgment only for the salvage proceeds of the rejected bauxite, $17,887.87, together with interest.

This Memorandum Opinion constitutes our findings of fact and conclusions of law.

The foregoing disposition of plaintiff's claim makes it unnecessary to rule defendant's contention that inasmuch as the rejected bauxite was not totally worthless, it was plaintiff's duty to accept the entire shipment and mitigate damages by undertaking to sell the ore at a price greater than its salvage value.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Appellant,

v.

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Appellee.

No. 79-1311.

United States Court of Appeals, Eighth Circuit.

Submitted Oct. 9, 1979.

Decided Feb. 5, 1980.

Rehearing Denied March 5, 1980.

Before ROSS and STEPHENSON, Circuit Judges, and McMANUS, District Judge.*

ROSS, Circuit Judge.

Appellant, Kaiser Aluminum & Chemical Corporation (Kaiser), instituted this action under the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 20(11), to recover the value of 12 carloads of bauxite allegedly contaminated while in the custody of Illinois Central Gulf Railroad Company (ICG). Originally filed in the Circuit Court of Audrain County, Missouri, the cause was removed to the United States District Court for the Eastern District of Missouri. The district court found that Kaiser failed to establish the delivery element of a prima facie case under the Carmack Amendment and accordingly denied Kaiser damages beyond the salvage value of the ore. We reverse and remand for further proceedings.

Calcined refractory grade bauxite is the primary component used by Kaiser in the manufacture of refractory

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*The Honorable Edward J. McManus, Chief Judge, United States District Court for the Northern District of Iowa, sitting by designation.

brick. Kaiser purchased the bauxite ore which is the subject of this suit through Philipp Brothers, an agent of the Guyana Bauxite Company, Ltd. of Guyana, South America, for delivery f. o. b. railcars at Mobile, Alabama.

By letter, Philipp Brothers notified ICG that the Bauxite, highly susceptible to contamination, would require clean, covered hopper cars, free of contaminants and suitable for transporting the ore. Although the letter referred to 13,000 metric tons of bauxite, the motor vessel Arrow Cane arrived at Mobile, Alabama on May 23, 1975, with 16,000 metric tons. Of this shipment, 4,272.158 metric tons were bound for Kaiser's plant at Mexico, Missouri, the balance being shipped to other refractory manufacturing companies.

The Alabama State Dock Authority, a public agency of the state of Alabama, wholly owned and operated the entire Mobile dock, storage area, equipment, and vehicles that were used in off-loading the motor vessel Arrow Cane and in loading the railcars and storing the ore. Both the dock personnel and Stanley Malabud, a representative of Philipp Brothers, testified that the area and the equipment used to load the railcars were clean, free of contaminants, and suitable for handling the bauxite. In addition, Malabud inspected the bauxite as the ship was unloaded.[1] He testified by deposition that the ore was uncontaminated. He also testified that he visually inspected all of the available railcars for contaminants, even though the railroad had been specifically requested to furnish clean cars on this occasion.

Fifty of the 63 railcars required to transport Kaiser's ore were available for immediate off-loading. These cars were loaded by the Alabama State Dock personnel, as was

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1. The Arrow Cane's previous contents were unknown but there was testimony to the effect that the ship had always carried bauxite. Calcined refractory grade [RASC] bauxite constituted the entire cargo of the Arrow Cane on this occasion.

customary, and returned to the railroad on a designated joint interchange track approximately one mile from the actual loading site. Only one of these cars was rejected by Kaiser as contaminated with tripoli, a substance not found in Guyana.

After loading all available cars, Alabama dock personnel removed the remainder of the ore from the ship into dump trucks, deposited it for ground storage nearby on a concrete pad, and covered it with a plastic sheet. The dock employees, who were familiar with handling bauxite, meticulously cleaned the pad and equipment to accept this cargo.

Several days later, ICG informed Kaiser that the only cars then available were open top hoppers. Kaiser agreed to the use of the open hopper cars even though closed hopper cars are customarily used to transport bauxite. Consequently, the remainder of the ore was removed from the pad and shipped on May 31 and June 3, 1975, in 13 open hopper cars to Kaiser's plant at Mexico, Missouri.

Malabud neither inspected these cars nor supervised their loading. Of these cars, eight had visible contaminants. These cars were unloaded and the ore was placed in a segregated pile. By mutual agreement of the parties, three other cars which Kaiser suspected of having contaminants were not unloaded. Subsequent analysis by Kaiser indicated contamination to this bauxite by laminetic ore, bituminous coal, gibbsite, silicates, sulphates, iron ore and other oxides. These contaminants rendered the bauxite worthless to Kaiser.

I. Standard of Review

From these facts the district court found that Kaiser failed to establish the requisite delivery element of a prima facie case of liability under the Carmack Amendment.[2] *Kaiser Aluminum & Chemical Corp. v. Illinois Central Gulf Railroad,* 468 F.Supp. 615, 618 (E.D.Mo.1979). This court is not at liberty to try a case *de novo* and must therefore give great deference to the factual findings of the district court. *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 183 (8th Cir. 1975). Such findings may not, however, be upheld where they are unsupported by substantial evidence or proceed from an erroneous conception of the applicable law. *Southern Illinois Stone Co. v. Universal Engineering,* 592 F.2d 446, 451 (8th Cir. 1979). After careful consideration of the entire record we are left "with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). We are convinced that the district court's finding that Kaiser failed to establish delivery of the bauxite in good condition is clearly erroneous, and pursuant to Rule 52 of the Federal Rules of Civil Procedure, must be set aside.

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2. The district court determined that although Kaiser may have made a prima facie showing on the delivery issue, Kaiser failed to sustain its burden of proof that the ore was in good condition when it was delivered to the railroad. It noted:

> Although the matter is not free from doubt, we hold that the trier of the fact could find that plaintiff made a prima facie case on the basis of Malabud's testimony that he visually watched the unloading of the ship's cargo and observed no foreign materials in the bauxite, together with the testimony of the employees of the Alabama State Docks that the concrete pad and all equipment used in the unloading process had theretofore been thoroughly cleaned. In our judgment, however, the overwhelming weight of the evidence negatives the verity of this weak prima facie showing. We find that plaintiff has not established by the preponderance of the evidence that the bauxite ore in question was in an uncontaminated condition when delivered to defendant.

Kaiser Aluminum & Chemical Corp. v. Illinois Central Gulf R.R., 468 F.Supp. 615, 618 (E.D.Mo. 1979).

II. Burden of Proof Under the Carmack Amendment

The Carmack Amendment to the Interstate Commerce Act,[3] 49 U.S.C. § 20(11), codifies the common law rule that a carrier, although not an absolute insurer, is liable "for the full actual loss, damage, or injury" to goods transported by it. However, there is no liability if the carrier can affirmatively demonstrate "that the damage was caused by '(a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) the public authority; (e) or the inherent vice or nature of the goods.'" *Missouri Pacific Railroad v. Elmore & Stahl*, 377 U.S. 134, 137, 84 S.Ct. 1142, 1144, 12 L.Ed.2d 194 (1964) (citations omitted). In an action to recover from a carrier for damage to a shipment, the consignee:

> establishes his prima facie case when he shows delivery [to the carrier] in good condition, arrival in damaged condition, and the amount of damages.

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3. The Carmack Amendment, 49 U.S.C. § 20(11), provides in pertinent part:

> Any common carrier * * * subject to the provisions of this chapter receiving property for transportation from * * * one State * * * to * * * another * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line * * * such property may pass * * * and no * * * limitation of any character whatsoever shall exempt such common carrier * * * from the liability imposed; and any such common carrier * * * shall be liable * * * for the full actual loss, damage, or injury to such property caused by it or by any such common carrier * * * to which such property may be delivered * * * notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or * * * tariff * * * and any such limitation * * * is declared to be unlawful and void * * * [however] nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law * * *.

> Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability.

Id. at 138, 84 S.Ct. at 1145 (citations omitted). Accordingly, "the carrier bears a heavy burden of proof akin to res ipsa loquitur because it has peculiarly within its knowledge the facts which may relieve it of liability." *Fulton v. Chicago, Rock Island & Pacific Railroad*, 481 F.2d 326, 333 (8th Cir.), *cert. denied*, 414 U.S. 1040, 94 S.Ct. 540, 38 L.Ed.2d 330 (1973).

ICG contends that Kaiser never established a prima facie case, so that it was never incumbent on the railroad to go forward with evidence rebutting Kaiser's prima facie showing by proving that it was free from negligence *and* that the contamination resulted from an excepted cause.

Kaiser's contention that it established the element of delivery in good condition is premised on (1) a bill of lading, (2) an admission by the freight claims director of the railroad, (3) the absence of cleaning records as to the railcars, (4) precautions taken by dock employees, (5) the appearance of the bauxite on delivery to the carrier, and (6) initial tests of the bauxite embodied in a certificate of analysis. We will deal with these items of evidence, *seriatim*.

III. The Bill of Lading

On May 4, 1975, the ICG executed a bill of lading acknowledging receipt of the bauxite "in apparent good order." ICG contends that the bill of lading is ineffective to establish the element of delivery in good condition. This court rejected a similar argument in *United States v. Mississippi Barge Line Co.*, 285 F.2d 381, 388-89 (8th Cir. 1960), holding that "A prima facie showing of delivery in

good condition is made through a bill of lading, executed by the carrier, containing a recital to that effect." (Citations omitted).[4] ICG has advanced no sufficient or logical reason for us to reject this rule of law.

ICG urges that the liability of a carrier for cargo does not commence until the goods are delivered to it and that delivery was not effected until after the ore was loaded in its cars and subsequent to the issuance of the bill of lading.[5] ICG insists that because the dock authority loads the

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4. We agree with the majority of courts which have addressed this issue that acknowledgement by a bill of lading that a shipment is in "apparent" good order without limitation is prima facie evidence of delivery in good condition as to all parts open to inspection and visible. This does not preclude a carrier from showing that the alleged damage resulted from existing causes which were not apparent when the carrier received the goods. *Cutten v. Allied Van Lines, Inc.*, 514 F.2d 1196, 1198-99 (9th Cir. 1975); *Horn v. Cia de Navegacion Fruco*, 404 F.2d 422, 435 (5th Cir. 1968), *cert denied*, 394 U.S. 943, 89 S.Ct. 1272, 22 L.Ed.2d 477 (1969); *Continental Grain Co. v. American Commercial Barge Line Co.*, 332 F.2d 26, 27 (7th Cir. 1964); *Tuschman v. Pennsylvania R.R.*, 230 F.2d 787, 791 (3d Cir. 1956). *Cf. Ed Miniat, Inc. v. Baltimore & Ohio R.R.*, 190 U.S.App.D.C. 380, 383, 587 F.2d 1277, 1280 (D.C.Cir. 1978) (recital of good order in bill of lading insufficient to establish condition of goods delivered under seal).

5. Our decision in *Republic Carloading and Distr. Co. v. Missouri Pacific R.R.*, 302 F.2d 381 (8th Cir. 1962), does not support ICG's contention that the bill of lading was issued before it assumed responsibility for the cargo. In *Republic Carloading*, the question was whether the railroad could be considered a common carrier and, as such, responsible for the loss or disappearance of shipments unloaded by the railroad for delivery to a freight forwarder, lessee of depot space. By specific lease agreement, the parties had extended liability to the freight forwarder for shipments by interstate truck and rail carriers other than the Missouri Pacific Railroad. This court held that:

> In order that a railroad have the status and absolute liability of a common carrier with respect to a shipment, the shipper must have delivered the freight into its possession, the delivery must be for immediate transportation, and the shipper must give the carrier appropriate shipping instructions.

Id. at 385 (citations omitted).

No dispute exists in this case as to ICG's status as a common carrier subject to the provisions of the Carmack Amendment.

ore, any contamination prior to delivery would not be discernible by railroad employees.[6] Further, it contends that only the shipper's agent is in a position and had the expertise to note defects in the ore.

This argument is specious. It does not excuse the ICG's own negligence in issuing the bill of lading acknowledging receipt of the ore in apparent good order with no noted exceptions. The railroad accepted the cargo in apparent good order and had ample opportunity to either inspect the goods or note that it was unable to ascertain their condition on delivery.[7] Despite ICG's contentions that there was ample time, potential and opportunity for contamination before the ore was delivered to the railroad, it failed to sustain its burden of proving that it was not negligent and introduced no evidence of precautions taken by the railroad to prevent contamination of the ore. Indeed, the dock employees' testimony that the ore was handled with care so as to prevent contamination and Malabud's testimony that the ore was uncontaminated when removed from the ship were uncontroverted.

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6. Bauxite is granular, ranges in color from gray to black, and is typically the size of gravel. Iron ore, one of the principal contaminants identified in 11 of the open hopper railcars, is black to red in color and marble size. That contaminant might have been difficult to detect to the untrained eye, but a white contaminant such as tripoli would have been readily visible whether in the ore before it was loaded into the railcars or in the empty railcars prior to loading.

7. Similarly, in *United States v. Mississippi Valley Barge*, 285 F.2d 381, 390-91 (8th Cir. 1960), a carrier urged that it be absolved of liability for cargo loaded by the shipper, claiming that the condition of the cargo was unknown to it despite statements in its bill of lading to the effect that the cargo was in good order. The court rejected this argument, noting that the carrier's bill of lading was free of noted exceptions and that it by its terms negatived the carrier's exception.

IV. Admission by a Party Opponent

L. B. Marzoni, Director fo Freight Claims Services for ICG, admitted in a letter mailed to Kaiser on April 26, 1976, that "[i]t is highly likely that contamination originated with one or more railcars." That statement was one of several summing up the railroad's understanding of the evidence at the time, in a letter declining Kaiser's claim. The other items noted by Marzoni in this summation of the railroad's understanding of this case merely suggested ICG's uncertainty as to the scope of the railroad's duty to furnish clean cars in this situation. Apparently, the district court gave little weight to this admission. Indeed, it is not even mentioned in the court's opinion. Kaiser argues that this admission should have been accorded greater weight by the district court. We agree.

Rule 801(d)(2)(D) of the Federal Rules of Evidence provides that a statement is not hearsay if it is offered against a party and is "a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." The statements were made by Marzoni as an employee of the railroad, they concerned a matter within the scope of his agency or employment, and they were made during the existence of that relationship. This admission may be considered reliable under Rule 801(d)(2)(D), as an admission of a party opponent made by an agent, a freight claims director, concerning a matter within the scope of his employment. While we do not consider this admission by ICG's employee conclusive on the issue of the condition of the ore upon delivery to the railroad, we do believe that it strongly suggests that at some point, even ICG believed that the source of the contamination was in its railcars. In fact, the emphasis of Marzoni's letter on the limited scope of the railroad's duty to provide clean cars strongly supports this inference. Accordingly, the district court should have con-

sidered this admission in determining whether Kaiser established a prima facie showing of delivery in good condition. *See generally Mahlandt v. Wild Canid Survival & Research Center, Inc.*, 588 F.2d 626, 630-31 (8th Cir. 1978).

V. Inspection of the Railcars

Although the ICG introduced testimony that its normal business practice was to inspect and clean its cars and to retain a record of this information, no such records were introduced into evidence. Kaiser contends that the nonoccurrence or nonexistence of any cleaning or inspection of these cars may be presumed under Rule 803(7) of the Federal Rules of Evidence. We agree Rule 803(7) provides that evidence of the absence of an entry in records regularly kept is admissible as affirmative proof of the nonoccurrence or nonexistence of a matter normally recorded.

ICG urges that the lack of inspection and cleaning records was merely circumstantial evidence that had no bearing on the issue of whether Kaiser proved the ore was delivered to the railroad in an uncontaminated condition.[8] In this respect it contends that Philipp Brothers did not rely on the railroad to furnish cars suitable for transporting the bauxite and undertook to determine for itself whether the cars were suitable for that purpose. The railroad claims that through Malabud's inspection, Philipp Brothers substituted its judgment for ICG's in selecting cars suitable for loading the bauxite. ICG's reliance on *Minneapolis, St. Paul & Sault Ste. Marie Railroad v. Metal-Matic, Inc.*, 323 F.2d 903 (8th Cir. 1963) for the proposition that it was under no duty to inspect the railcars is misplaced. There we held that a delivering rail carrier's liability could not

8. According to the railroad's records, the contents of the one closed hopper car that was rejected by Kaiser held prior contents that were unknown. This car was part of the first shipment.

be premised on the shipper's reliance on an inspection of the shipment by the initial carrier's inspector. As was the case here for the first 50 closed hopper cars transporting ore to Kaiser, in *Metal-Matic* "[t]he evidence of responsible officers of the shipper was to the effect that they did not rely on any inspection made by the initial carrier." *Id.* at 907. In *Metal-Matic,* however, the carrier introduced evidence of the good condition of its cars and persuasively excluded any possibility of carrier negligence. No such evidence was adduced in the instant case to preclude a finding of negligence on the part of ICG. *See also Masonite Corp. v. Norfolk & Western Railway,* 601 F.2d 724, 728 (4th Cir. 1979).

ICG sought to introduce evidence that damage to the cargo resulted from an act of the shipper.[9] Stanley Malabud, an agent for Philipp Brothers inspected the closed hopper cars, equipment for loading, and the bauxite as it was being unloaded. Only one of these 50 closed cars inspected by Malabud was rejected by Kaiser. Tripoli, an easily seen white contaminant, constituted 20 to 30 percent of the load. The record indicates that the previous contents of that car were unknown. Thus, Malabud either failed to observe tripoli in the car or in the bauxite as it was being unloaded. Since only one of the 50 closed hopper cars transported to Kaiser was contaminated, and no other contamination claims were received from other consignees of this shipment of ore, we consider it highly unlikely that

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9. Ordinarily, it is not the shipper's duty to select suitable cars, but the carrier is relieved from liability for failure to furnish such cars if the shipper voluntarily selects cars under an express contract or in circumstances charging him with full knowledge of all defects and in reliance on his own, rather than the carrier's judgment. But the Carmack Amendment imposes on a carrier the burden of proving both its freedom from negligence and damage due to an excepted cause. There was no evidence presented here to the effect that the shipper knew or should have known that the cars were contaminated.

the ore itself was delivered to the railroad in a contaminated condition.

The district court inferred that Malabud necessarily missed contaminants in the bauxite in the ship's hold, since he missed the contaminant tripoli in the enclosed hopper car. The court stated that:

> As we view the evidence, plaintiff must stand or fall on Malabud's testimony that he watched the ship's unloading process carefully enough to ascertain that all the bauxite being removed from the vessel was free of contaminants. We have noted supra that Malabud failed to note the presence of tripoli. It is equally likely that he failed to note the presence of other contaminants in the bauxite being removed from the bottom of the hold at the end of a very long day.

Kaiser Aluminum & Chemical Corp. v. Illinois Central Gulf Railroad, supra, 468 F.Supp. at 619. In support of its position, the district court noted that Malabud slept during part of the unloading process. Our reading of his deposition convinces us that Malabud observed the entire unloading of the ship. As a part of the cross-examination the following testimony was received:

> Q. And when did you leave the vessel at what point in the unloading?
>
> A. At night. I can't recall what time it was but just to get a few hours sleep.
>
> Q. The record, I think, indicates that the unloading was completed sometime around 1:00 or 1:30 A.M. With relation to that hour what time did you leave the vessel?
>
> A. Not until after the vessel was finished.

Earlier, on direct, Malabud stated that he was present during the entire loading procedure. Malabud's failure to discover the one car contaminated by the tripoli, in the absence of any affirmative evidence showing that the railroad was not negligent, or any evidence other than pure conjecture on the part of the railroad as to the source of contamination, may not be accorded the weight given it by the district court. The railroad here has introduced virtually no evidence to establish that it was not negligent. *Cf. Masonite Corp. v. Norfolk & Western Railway, supra,* 601 F.2d at 728.

As for the last 13 open hopper cars delivering the bauxite which had been stored on the concrete pad which are the subject of this claim, the railroad clearly had a duty to deliver cars clean and suitable for the transportation of bauxite. Neither Kaiser nor representatives of Philipp Brothers inspected these cars. No cleaning records were introduced to establish the suitability of these cars. Moreover, no records were introduced to show inspection of the cars by the railroad. Under federal common law, shippers may ordinarily assume that railroads have inspected the cars they furnish. *Millers Mutual Insurance Association v. Southern Railway,* 483 F.2d 1044, 1047 (4th Cir. 1973).

In the absence of any affirmative showing by the railroad that it was in no way negligent, it may not be absolved of liability for the open hopper cars under the Carmack Amendment.

VI. Deposition Testimony

The railroad hypothesized that the 11 rejected open hopper cars were contaminated[10] due to some negligence on the part of the dock employees. It surmised that the ore might have become contaminated while ground-stored within 200 feet of iron ore and that equipment used for the iron ore was the same as that used for the bauxite. Mere speculation, however, is insufficient to rebut the prima facie showing established by Kaiser of delivery in good condition. As the Supreme Court explained in *Missouri Pacific Railroad v. Elmore & Stahl, supra,* 377 U.S. at 143-44, 84 S.Ct. at 1148:

> The general rule of carrier liability is based upon the sound premise that the carrier has peculiarly within its knowledge "[a]ll the facts and circumstances upon which [it] may rely to relieve [it] of [its] duty * * *. In consequence, the law casts upon [it] the burden of the loss which [it] cannot explain, or explaining, bring within the exceptional case in which [it] is relieved from liability."

(Citation omitted.) No direct evidence was submitted by the railroad to contradict the evidence establishing the great care taken by the dock employees in loading and storing the ore, and in handling and cleaning their equipment. Their deposition testimony supports the inference that the ore was uncontaminated when delivered to the

---

10. The evidence was inconclusive as to whether all of the ore in these cars arrived in damaged condition. *Kaiser Aluminum & Chemical Corp. v. Illinois Central Gulf R.R., supra,* 468 F.Supp. at 619. ICG acquiesced in Kaiser's representation that it suspected contaminants in the last three cars and requested that the ore remain unloaded. The district court found that as many as four of the open top hopper cars were contaminated in addition to the closed hopper car containing tripoli. We assume therefore, for the purpose of this appeal, that at least seven of the open top hopper cars were contaminated.

railroad. It also negates any inference that the ore was contaminated during the loading procedure.

VII. Certificate of Analysis

Finally, Kaiser introduced a certificate of analysis revealing no contaminants in a representative sample of the ore obtained prior to its shipment from Guyana. The district court admitted the certificate of analysis as a business record under Rule 803(6) of the Federal Rules of Evidence, but found it unpersuasive on the issue of delivery in good condition, reasoning that:

> [T]here is no evidence, either in the affidavit, the certificate of analysis or elsewhere, as to the date, time or place at which the sample of ore was obtained and the analysis was made, or with respect to the circumstances and procedures involved in obtaining a representative sample and making the analysis.

Kaiser Aluminum & Chemical Corp. v. Illinois Central Gulf Railroad, supra, 468 F.Supp. at 618. We cannot say that the district court clearly erred in declining to accord the certificate much probative value on the issue of the actual condition of the ore at the time it was removed from the ship's hold. *See, e. g., Aunt Mid, Inc. v. Fjell-Oranje Lines,* 458 F.2d 712, (7th Cir. 1972).

VIII. Conclusion

We have considered the other arguments of the parties and we find them to be without merit. We believe that the cumulative effect of the bill of lading acknowledging receipt in good order, the admission by ICG's freight claims director, the absence of any cleaning records for the cars in question, and the uncontroverted testimony of Malabud and the dock employees sufficed to establish the element of delivery in good condition under the Carmack

Amendment. Indeed, under the circumstances, we fail to see what further evidence could have been submitted by Kaiser to establish delivery of the ore in an uncontaminated condition. As the Supreme Court stated in *Missouri Pacific Railroad v. Elmore & Stahl, supra*, 377 U.S. at 144, 84 S.Ct. at 1148:

> We are not persuaded that the carrier lacks adequate means to inform itself of the condition of goods at the time it receives them from the shipper, and it cannot be doubted that while the carrier has possession, it is the only one in a position to acquire the knowledge of what actually damaged a shipment entrusted to its care.

The district court concluded that Kaiser established the second element of arrival of the ore in a damaged condition. It is clear from the district court's award of damages in the amount of the salvage value of the ore that the third element of a prima facie case under the Carmack Amendment has also been established. In the absence of any rebuttal evidence establishing ICG's freedom from negligence and that the source of contamination was due to an excepted cause, we conclude that the liability of the railroad has been established under the Carmack Amendment.

On remand, the district court should determine the damages owed Kaiser under the principles enunciated by this court in *Chicago and North Western Railroad v. Union Packing Co.*, 514 F.2d 30, 35 (8th Cir. 1975) and *Fraser-Smith Co. v. Chicago, Rock Island & Pacific Railroad*, 435 F.2d 1396, 1399 (8th Cir. 1971). If it is found on remand that ICG in fact agreed mutually with Kaiser not to unload three of the open hopper cars to treat them as being contaminated, ICG should be estopped from claiming that these railcars were not contaminated.

The judgment of the district court is reversed and the cause remanded for a determination of damages.

79-1910
No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Petitioner,
v.
KAISER ALUMINUM & CHEMICAL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

BRIEF FOR KAISER ALUMINUM & CHEMICAL CORPORATION IN OPPOSITION

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Petitioner,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

BRIEF FOR KAISER ALUMINUM & CHEMICAL CORPORATION IN OPPOSITION

The respondent, Kaiser Aluminum & Chemical Corporation ("Kaiser") respectfully prays this Court deny the Illinois Central Gulf Railroad Company's ("ICG") petition requesting that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 4, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. A-12 to A-27) is reported at 615 F.2d 470. The opinion of the United States District Court for the

Eastern District of Missouri (Pet. App. A-2 to A-11) is reported at 468 F.Supp. 615. Unless otherwise designated, citations will be to the appendix filed in the Court of Appeals.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 4, 1980. The ICG's Petition for a Rehearing En Banc was denied on March 5, 1980. The ICG's petition for a Writ of Certiorari was filed within ninety days of the denial. This Court's jurisdiction is invoked under 28 USC Section 1254(1).

QUESTION PRESENTED

Did the Court of Appeals properly apply the established case law to the uncontroverted facts when it determined that Kaiser had proved a prima facie case of "delivery" under the Carmack Amendment?

STATUTORY PROVISIONS INVOLVED

The United States Code, Title 49:

> Section 20(11). Any common carrier . . . subject to the provisions of this chapter receiving property for transportation from a point in one State . . . to a point in another State . . . shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States . . . and no contract, receipt, rule, regulation or other limitation of any character whatsoever shall exempt such common carrier, railroad . . . from the liability imposed; and any such common carrier, railroad . . . so receiving property for transportation from a point in one State . . . to a

> point in another State . . . shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it . . .
>
> (Revised and Codified, October 17, 1978 as 49 U.S.C. Section 11707.)

STATEMENT OF THE CASE

Kaiser Refractories, a division of Kaiser Aluminum & Chemical Corporation, manufactures refractory products as its facility in Mexico, Missouri. Refractory products are used by industry to contain high temperatures. For instance, refractory products are used to line steel blast furnaces. Some refractory products can withstand temperatures up to 3000 degrees Fahrenheit. An important component of some refractory products is calcined refractory grade bauxite. ("RASC bauxite") This grade of bauxite is produced in South America by the Guyana Bauxite Company, Ltd.

Kaiser placed its purchase orders for RASC bauxite through the mining company's agent, Philipp Brothers.

RASC bauxite is easily contaminated. (A.-272, 438, 441)

By a letter dated April 30, 1975, Phillipp Brothers requested the ICG to furnish clean railcars, free of contaminants, to transport RASC bauxite due at the Alabama State Docks in Mobile, Alabama on or about May 15, 1975. (Kaiser Exhibit 7, A-260) The M/V Arrow Cane carrying 16,000 metric tons of RASC bauxite arrived at the Alabama State Docks on May 25, 1975. (A.-311) Prior to unloading the Arrow Cane, employees of the Alabama State Docks cleaned and washed the entire unloading system. (A.-307, 308, 386, 391, 422, 425) Mr. Stanley Malabud, an employee of Philipp Brothers, inspected the cargo and found it to be clean. (A.-273) He also inspected the covered

hopper cars provided by the ICG. He rejected five to ten of the railcars because they were not clean. (A.-276) The ICG did not provide a sufficient number of railcars to unload the Arrow Cane. Consequently, part of the RASC bauxite was stored at the Alabama State Docks. (A.-278) Mr. Malabud inspected the pad and found it to be free and clean of contaminants. (A.-279-280) After it was placed on the pad, the RASC bauxite was covered with a plastic sheeting. (A.-280) There were no other products or minerals within 200 feet of the stored RASC bauxite. (A.-388, 406) At this time, the Alabama State Docks did not handle or store sulfides, leached carbonates, rock fragments, silicates, quartz, ballast rock or limestone. (A.-389, 390)

On May 30, 1975 and June 3, 1975 the ICG provided 13 open top hopper cars to transport the stored RASC bauxite. (A.-317, 318, 332) The bauxite was placed in these cars with a front end loader which was cleaned before it transported the bauxite. (A.-22)

The ICG issued a Bill of Lading for this cargo acknowledging receipt of the RASC bauxite "in apparent good order". (Kaiser Exhibit 6, A.-610)

When the 13 open top hopper cars arrived at Kaiser's plant in Mexico, Missouri, 8 of them were unloaded and found to have contaminants. (A.-124, 137) It was agreed that the other open top railcars would not be unloaded. (A.-573) One of the covered hopper cars contained a white contaminant. (A.-107)

Samples of the contaminants were tested at Kaiser's laboratory in Pleasanton, California. The contaminants found were tripoli, furnace slag, iron ore oxide, limonitic iron, coal, gibbsite and clay. (A.-154, 158, 162) The presence of these contaminants made the RASC bauxite unfit for use by Kaiser. (A.-157, 163)

In a business letter dated April 26, 1976, from Mr. L. B. Marzoni, the Director of Freight Claim Services for the ICG, to Kaiser, Marzoni admitted that: "It is highly likely that contamination originated with one or more railcars." (Kaiser Exhibit 13, A.-618)

The 13 open top hopper cars immediately prior to their transportation of Kaiser's RASC bauxite carried the following cargos:

Car Numbered	Prior Contents	
IC 77193	Limestone	
IC 77213	Iron Ore	
GM&062167	Bauxite Ore	
IC 65850	Bauxite Ore	
IC 76129	Furnace Slag	
IC 65419	Iron Ore	
IC 75316	Ballast Rock	
ICG 332813	Limestone	
IC 66586	Limestone	
ICG 321452	Limestone	
IC 89527	Limestone	
GM&080139	Unknown	(A.-433)

Philipp Brothers did not receive any contamination complaints from the other recipients of the M/V Arrow Cane's cargo of RASC bauxite. (A.-285)

The Carmack Amendment, 49 U.S.C. Section 20(11), establishes the liability of a common carrier for damaged cargo. In *Missouri Pacific Railroad Company* v. *Elmore & Stahl,* 377 U.S. 134, 84 S.Ct. 1142 (1964) this court set forth the requirements for a prima facie case under the Carmack Amendment: (1) The cargo was delivered to the carrier in good condition (this referred to as the "delivery requirement"); (2) The cargo reached its destination in damaged condition; and (3) The extent of damages sustained. Upon establishment of the prima

facie case, the burden shifts to the carrier to demonstrate its freedom from negligence and that the damage resulted from one of the exceptions for which a carrier is not liable. The controversy herein involved is whether Kaiser offered sufficient evidence to satisfy the delivery requirement.

The trial of this action occurred in the United States District Court for the Eastern District of Missouri in March of 1979. At the trial, in an attempt to establish the delivery requirement, Kaiser offered the following evidence: (1) ICG's bill of lading reciting receipt of the bauxite in apparent good order; (2) the admission of ICG's freight claims director that it was highly likely that the contamination originated in one or more railcars; (3) the fact that ICG had no record it had cleaned the railcars that transported the bauxite; (4) cleaning and handling precautions undertaken by the employees of the Alabama State Docks; (5) the clean appearance of the bauxite upon delivery to ICG; and (6) the satisfactory tests conducted on the bauxite at the mining site. Notwithstanding the ICG's failure to present contrary evidence, the District Court held Kaiser had failed to satisfy the delivery requirement. 468 F.Supp. 615 (E.D. Mo. 1979). The United States Court of Appeals for the Eighth Circuit reversed holding Kaiser had established a prima facie case. 615 F.2d 470.

ARGUMENT

I.

It Is Within Authority Of A United States Court Of Appeals To Overturn Factual Findings And Conclusions Of A District Court When The Judgment Is Not Supported By Substantial Evidence.

Petitioner contends the Court of Appeals, by rejecting the factual findings of the District Court, "unjustifiably conducted a denovo review of disputed facts . . ." (Petitioner's brief, p. 18). Federal Rule of Civil Procedure 52(a) governs the authority of an appellate court to disregard factual findings of a lower court. Rule 52 states in part that "factual findings shall not be set aside *unless clearly erroneous.*" (Emphasis added) This unequivocally indicates that an appellate court may redetermine facts if it is left with the definite and firm conviction that a mistake has been made. *Southern Illinois Stone Company* v. *University Engineering Corporation,* 592 F.2d 446 (8th Cir. 1979).

Kaiser presented an unqualified bill of lading, and five additional *uncontroverted* evidentiary facts. The Court of Appeals reversed as "clearly erroneous" the District Court's finding that such evidence was insufficient to satisfy the delivery requirement. The Court of Appeals, pursuant to FRCP 52(a) was acting within its sound discretion and, therefore, this Court should not be burdened with a further review which would test this sound decision of the Court of Appeals for the Eighth Circuit.

II.

The Court Of Appeals' Holding Followed Established Precedents; Therefore, The Only Issue Is Whether Respondent's Evidence Satisfied The "Delivery Requirement". The United States Supreme Court Should Not Be Required To Review The Court of Appeals' Application Of the Uncontroverted Facts To The Established Law.

Petitioner contends the Court of Appeals erred in ignoring precedent, by according the bill of lading's recital too much weight. In support of this contention petitioner cites seven cases in which the delivery requirement was held unsatisfied notwithstanding the fact that the carrier had issued a bill of lading to the shipper. Each can be distinguished from the facts of this case.

Petitioner cites *Hoover Motor Express Co.* v. *United States,* 262 F.2d 832 (6th Cir. 1959), in which the cargo delivered to the carrier was machinery housed in closed wooden crates. Upon receipt of the cargo, the carrier issued a bill of lading stating the cargo was in apparent good order. The bill of lading also stated that the "contents and condition of contents unknown". The Court held the latter clause constituted an "express limitation" on the carrier's liability and, therefore, the recital of "in apparent good order" applied only to the crates and not to the machinery contained therein. In the present case there was no such "express limitation" on petitioner's bill of lading, rather it unequivocally stated the bauxite was in "apparent good order".

Hoover is also distinguishable on a second point. In *Missouri Pacific,* supra, this Court stated:

> "The general rule of common carrier liability is based upon the sound premise that the carrier has peculiarly within its knowledge all the facts and circumstances on which it may rely to relieve itself of liability." 377 U.S. 134 (1964).

As stated, in *Hoover* the cargo was housed in closed wooden crates. Hence, absent breaking into the crates, the carrier had no means by which to examine the machinery and, therefore, no means by which to acquire the knowledge which *Missouri Pacific* states is the basis of common carrier liability. In the present case the RASC bauxite was contained in open railway cars and was easily accessible to examination without petitioner's being required to break into a container provided by the shipper. The RASC bauxite was not in a sealed container.

Petitioner cites *Armour Research Foundation of Illinois Institute of Technology* v. *Chicago, Rock Island and Pacific Railroad Co.*, 311 F.2d 493 (7th Cir. 1963); and *Clark* v. *Barnwell*, 53 U.S. 272, 12 How. 272 (1851). In *Armour* the cargo of electronic equipment was delivered to the carrier in a locked van, upon receipt of which the carrier issued a bill of lading which was silent as to the nature and condition of the van's contents. In *Clark* the cargo was delivered to the carrier in closed boxes and the bill of lading included the statement "contents unknown". In both *Armour* and *Clark* the cargo was packaged such that to make an inspection the carrier would have been required to break into a container provided by the shipper. Moreover, in each case the bill of lading, either expressly or impliedly, indicated the carrier's ignorance of the nature and condition of the cargo.

Each remaining case cited by the petitioner in support of its contention involved cargo which was delivered to the carrier under seal or in a closed package; *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 313 F.2d 864 (7th Cir. 1963); *Blue Bird Food Products Co.* v. *Baltimore & Ohio Railroad Co.*, 492 F.2d 1329 (3rd Cir. 1974); *Ed Miniat, Inc.* v. *Baltimore and Ohio Railroad Co.*, 587 F.2d 1277 (D.C. Cir. 1978); *The Niel Maersk*, 91 F.2d 932 (2nd Cir. 1937); or involved a bill of lading which expressly indicated the carrier's ignorance of the nature and condition of the cargo. *Ohio Galvanizing & Manufacturing Company* v. *Southern Pacific Company*, 39 F.2d 840 (6th Cir. 1930).

When, as in the present case, the cargo is not packaged or sealed when delivered to the carrier, the case law has held a bill of lading unqualifiedly stating "in apparent good condition" is prima facie evidence that the cargo was delivered to the carrier in good condition. *Cutten* v. *Allied Van Lines, Inc.*, 514 F.2d 1196 (9th Cir. 1975); *Horn* v. *Cia de Navegacion Fruco*, 404 F.2d 422 (5th Cir. 1968); *Continental Grain Co.* v. *American Commercial Barge Line Co.*, 332 F.2d 26 (7th Cir. 1964); and *Tuschman* v. *Pennsylvania R.R.*, 230 F.2d 787 (3rd Cir. 1956).

The Court of Appeals determined that the District Court had committed a mistake when it rendered a judgment in favor of the ICG. (Pet. App. A-15) The Court of Appeals held that Kaiser had in fact established delivery of the RASC bauxite to the ICG in good condition. It also held that Kaiser had established the remaining two elements required for liability to be imposed upon the common carrier under the Carmack Amendment. The ICG presented no evidence to controvert these facts. In addition, it did not present any evidence to show the damage may have been caused by one of the five recognized exceptions to liability under the Carmack Amendment. These exceptions apply if the damage to the cargo be a direct result of an act of God, or the public enemy, or the act of the shipper, or by the public authority, or due to the inherent vice or nature of the goods. (Pet. App. A-16)

The petitioner's writ for certiorari subtlely requests that this court review the quantum of evidence offered by Kaiser to determine whether it was sufficient to satisfy the "delivery requirement" of the Carmack Amendment. This question of fact has already been carefully reviewed in the well-written opinion of the Court of Appeals for the Eighth Circuit. The decision of the Court of Appeals is sound and corrects a fundamental mistake which was committed by the District Court when it departed from the rules of law established by this Court. The Court of Appeals' decision does not conflict with earlier decisions of this Court and is in line with decisions of other Courts of Appeal. The ICG should not attempt to contaminate its legal cargo by trying to compare cases involving cargos which are sealed and which cannot be inspected with a shipment of RASC bauxite which was available for visible inspection at any time by the railroad. As a matter of fact, ICG's representative almost daily visited the docks. (A.-544) This circumstance coupled with the fact that the railroad admitted it had no record of cleaning the railcars in question, the director of freight claim services for the ICG admitted that contamination could have occurred in

one or more of the railcars, the extreme precautions taken by the employees of the Alabama State Dock to insure the cleanliness of the unloading facilities and the bold admission by the ICG's bill of lading that the RASC bauxite when received by the ICG contained no apparent contaminants leaves room for only one conclusion. Kaiser met its burden of proof and the ICG failed to go forward with the evidence. In light of this, the petition for certiorari should not be granted by the Supreme Court. The statistics cited by petitioner in its brief as to the amount of claims paid, the decline of total amount of revenue indicate the laxness with which the railroads ship their cargo. It does not indicate a basis for the granting of the extraordinary remedy of review by a writ of certiorari.

For the first time in this case, the ICG has resorted to 49 U.S.C. Section 101 in an attempt to escape liability. This statute provides that:

> "When package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them . . . or by a statement that the goods are said to be goods of a certain kind or quantity, . . . such statements, if true, shall not make liable the carrier issuing the bill of lading, . . . The carrier may also by inserting in the bill of lading the words 'Shipper's weight, load, and count,' or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; . . ."

The bill of lading issued by the ICG in this case contains no wording or language which would allow 49 U.S.C. Section 101 to apply. As noted in *Tuschman* v. *Pennsylvania R.R.*, 230 F.2d 787 (3rd Cir. 1956), the ICG's bill of lading is prima facie evidence that the RASC bauxite was uncontaminated at the time it was placed in the railcars.

CONCLUSION

Respondent respectfully submits that the Court of Appeals had the authority to disregard the clearly erroneous findings of the District Court. The decision of the Court of Appeals followed and applied the established precedents announced by this Court in the decision of *Missouri Pacific Railroad Company* v. *Elmore & Stahl,* 377 U.S. 134 (1964). The Court of Appeals' finding that the bill of lading's recital and the five additional pieces of uncontroverted evidence was sufficient to satisfy the delivery requirement involved an application of the uncontroverted facts in this case to the law set forth in the *Missouri Pacific* v. *Elmore & Stahl* decision. The petition for writ of certiorari does not involve a novel question for review by this Court. The petitioner's request should be denied.

Respectfully submitted,

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